Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

COMMENTS OF INSP, LLC

INSP, LLC
3000 World Reach Drive
Indian Land, South Carolina 29707
(803) 578 – 1000

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EXECUTIVE SUMMARY

INSP, LLC ("INSP") applauds the Commission for moving forward expeditiously, from its Notice of Inquiry ("NOI"), to issue the Notice of Proposed Rulemaking ("NPRM") in this proceeding. The Commission's prompt action reflects the continuing erosion of true source diversity in television programming caused by increasing concentration in media ownership and the bundling of conglomerate-owned networks associated therewith, the dire state of independent and diverse programmers, and the urgent need for regulatory relief.

The plight of independent programmers, and the American television viewers they seek to serve, appropriately is a bipartisan concern. The record in this proceeding has revealed a broken marketplace in which increasingly powerful conglomerate programmers consume an ever-growing share of MVPD capacity, creating almost insurmountable barriers for independent programmers. Presently, ***nine out of every ten television viewing hours*** are on conglomerate networks, notwithstanding that numerous independent networks have stronger ratings than many of the conglomerates' lesser viewed networks. Given the overwhelming economic advantages enjoyed by conglomerates over independents, and further consolidation in the media industry, this situation is all but certain to worsen, and it is unrealistic to expect market forces to provide a remedy.

The NPRM includes a number of critical findings, including: (1) the Commission has a statutory obligation to promote competition and a diversity of independent programming sources; (2) independent programmers face significant challenges in the video marketplace; and (3) the Commission should act to remove marketplace obstacles that hinder independent programmers from reaching consumers. It is therefore axiomatic that the Commission should act

– indeed, given its statutory duties, ***must*** act – to remove marketplace obstacles that threaten the survival of independent programmers.

Unfortunately, the NPRM largely ignores the root cause of the challenges facing independent programmers. The NPRM lays the blame almost entirely at the foot of MVPDs, while all but ignoring a far more serious problem: the widespread, anticompetitive practice known as "forced tying and bundling," which has become business as usual for the "big media" conglomerate programmers. This practice, which media conglomerates enforce to discriminatorily favor their lesser-viewed channels, poses an imminent threat to the survival of independent networks, and necessitates that the Commission swiftly move to amend the program carriage rules as follows:

- MVPDs should be required to engage with independent programmers in *bona fide* negotiations to attain carriage terms (including, for example, license fee compensation, tier placement, packaging, channel positioning and alternative means of distribution) that are fair, reasonable and nondiscriminatory in comparison to those received by conglomerate programmers' networks.

- MVPDs should be required to engage in transparent evaluation and selection processes.

- Nondiscrimination should be determined based on a comparison of objective factors such as ratings, consumer demand, diversity and uniqueness of programming, and similar verifiable criteria. This can be developed based on credible, independent sources (*e.g.*, audience data from Nielsen and/or comScore, and industry and consumer data compiled by SNL Kagan).

- The Commission should provide a remedial complaint process that enables independent networks that have been treated in a discriminatory manner to obtain timely, cost-effective relief free of fear of retaliation.

INSP supports the Commission's proposal to prohibit "unconditional" most-favored nation ("MFN") provisions, but the changes contemplated by the Commission do not go nearly far enough. MFNs, as employed in the multichannel television industry, are anticompetitive and not in the public interest because of the harm they cause to independent networks and television viewers, and the absence of countervailing benefits. Accordingly, in addition to the proposed prohibition on unconditional MFNs, INSP suggests that the Commission should restrict MVPDs' use of predatory MFN clauses in agreements with independent programmers, for example, by:

- prohibiting "cherry-pick" MFNs, "MFNs on MFNs," and other MFN requirements that provide MVPDs with anything more than traditional volume-based MFN protections;

- requiring that an MVPD agree to comply with all terms, conditions and obligations that are integrally related, logically linked or directly tied to the more favorable provision;

- requiring that volume-based MFNs imposed by an MVPD on an independent programmer be in material parity with, and not more burdensome than, the least burdensome volume-based requirements that the MVPD applies to any of the twenty (20) largest cable networks it carries; and

- requiring that any MVPD that requires an MFN from an independent programmer be required in turn to give the programmer an MFN guaranteeing that such programmer's terms will be no less favorable than the best terms the MVPD gives to any other comparable network (as determined by ratings or other objective measure).

The NPRM correctly finds that alternative distribution method ("ADM") provisions are being used to impede competition among new online competitors and limit the ability of independent programmers to reach viewers through alternative distribution channels. INSP therefore supports the Commission's proposed ban on unreasonable ADM provisions. However, the Commission should also consider additional rules to protect independent programmers against overly restrictive ADM provisions. For example:

- MVPDs should not be allowed to prevent independent networks from presenting via ADMs reasonable portions of programming that currently is being distributed on MVPDs' platforms, for purposes of promoting viewer interest in such programs, testing new distribution platforms and methods, and developing additional revenue streams.

- Independent networks should be protected from being coerced to assign to MVPDs the rights to distribute the networks' content over alternative distribution platforms.

The Commission has been considering revision of its program carriage rules since as early as 2011, but has declined to act. In the meantime, numerous independent networks have ceased operations, unable to survive in a marketplace dominated by conglomerate networks. The victims of the oligopoly conditions that characterize the multichannel landscape today are not just independent networks, but the American viewing public, which increasingly is being denied the opportunity to receive truly diverse programming. The Commission's statutory obligation to promote source diversity mandates that it take prompt and decisive action to ensure that independent networks have fair access to MVPDs' linear capacity on nondiscriminatory terms.

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COMMENTS OF INSP, LLC

INSP, LLC ("INSP") applauds the Commission for moving forward expeditiously, from its Notice of Inquiry ("NOI"),[1] to issue the Notice of Proposed Rulemaking ("NPRM")[2] in this proceeding. The Commission's prompt action is a reflection of the continuing erosion of true source diversity in television programming caused by increasing concentration in media ownership, the dire state of independent and diverse programmers, and the urgent need for regulatory relief.

In explaining the marketplace and regulatory conditions that underlie its issuance of the NPRM, the Commission recognizes that independent programmers face "significant challenges" (NPRM ¶ 6), and that near-term action by the Commission is needed.[3] However, the Commission's explanation substantially understates the severity of the significant barriers that impede independent programmers, and the perilous, steadily worsening video marketplace that confronts them. Some have assumed that the advent of new, nascent distribution technologies

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1 *Promoting the Availability of Diverse and Independent Programming*, Notice of Inquiry, 31 FCC Rcd 1610 (FCC rel. Feb. 18, 2016) ("NOI").
2 *Promoting the Availability of Diverse and Independent Programming*, Notice of Proposed Rulemaking, FCC 16-129, 2016 FCC LEXIS 3290 (FCC rel. Sept. 29, 2016) ("NPRM").
3 *See* NPRM ¶ 3 (finding that the Commission should act "to remove marketplace obstacles that may hinder independent programmers from reaching consumers."); NPRM ¶ 18 (proposing new rule prohibiting unconditional MFN provisions); and NPRM ¶ 23 (proposed new rule prohibiting unreasonable ADM provisions.).

such as over-the-top ("OTT") delivery of video content will address these issues. However, as will be made clear in the following discussion below, these assumptions are not correct.

The NPRM also largely ignores the root cause of the challenges facing independent programmers. The Commission lays the blame almost entirely at the foot of multichannel video programming distributors ("MVPDs"), while all but ignoring a far more serious problem: the widespread, anticompetitive practice known as "forced tying and bundling," which has become business as usual for the "big media" conglomerate programmers and their symbiotic MVPD partners. While the rules proposed in the NPRM pertaining to unconditional most-favored nation ("MFN") and unreasonable alternative distribution method ("ADM") provisions certainly are a step in the right direction, standing alone they would be an incomplete and inadequate remedy, for they would fail to address the truly existential threat to independent programmers who are struggling to survive in today's video marketplace.

Rules designed to level the playing field for independent and diverse programmers, and to ensure that they have fair access to MVPDs' linear platforms on nondiscriminatory terms, are desperately needed and long overdue.[4] Such action is amply supported by the Commission's existing authority under the Communications Act, and is essential if the Commission is to fulfill its statutory duty to promote true source diversity in the delivery of video programming to the American viewing public.

I. BACKGROUND REGARDING INSP

INSP is an independently-owned cable television network headquartered in Indian Land, South Carolina. Launched in 1990, INSP exhibits wholesome, family-friendly, general

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[4] For example, in 2011, the Commission issued a Notice of Proposed Rulemaking in MB Docket No. 11-131, *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage* (FCC 11-119, 26 FCC Rcd. 11494, rel. Aug. 1, 2011), but that proceeding has languished.

entertainment programming, which is welcomed by American families in an era when much of the video content available to them on television, in movie theaters and online continues to grow more and more coarse.

INSP currently is distributed by all major cable and satellite distributors to a total of approximately 83 million homes. It is a Top 40 C3 network, as determined by Nielsen, and its ratings are strong, continuing to grow, and indeed are higher than many networks owned by content conglomerates. While INSP's admirable development reflects the quality and appeal of its programming, it also is due in part to the fact that INSP, since its inception, has been distributed on a *license fee-free* basis. Yet, even as a free and highly-rated service, INSP has encountered very significant challenges in achieving its current distribution, and faces even greater challenges ahead in retaining that distribution, promoting further growth, and evolving to an economic model that will enable it to increase production of its own high-quality and differentiated programming. This plight is due largely to increasing consolidation among content conglomerates and a reluctance among certain multichannel television distributors to launch, and fairly compensate, independent networks. In this regard, INSP is representative of scores of independent video programmers that face similar hurdles and are struggling to survive in the current television marketplace.

II. THE COMMISSION'S PROPOSED DEFINITION OF INDEPENDENT PROGRAMMER IS TOO NARROW

The Commission has requested comment as to how "independent video programming vendor" should be defined. NPRM ¶ 16. Noting that the definition that it proposed in the NOI was criticized as being too broad, potentially including large, non-vertically integrated programmers that have substantial marketplace leverage to resist MVPD demands and that "do not confront the same obstacles in securing carriage for their content as smaller or niche programmers" (NPRM ¶ 16 (footnote omitted)), the Commission asks whether, instead, it should consider adopting either a revenue or assets-based definition and, if so, whether the threshold should be based solely on programming license fees and/or advertising revenues. The Commission also asks whether the video programming vendor should be attributed with revenues and/or assets of affiliated entities.

INSP believes that this approach is ill-advised for a number of reasons. First, it would be entirely impractical, in that it would involve unduly complicated financial and accounting analyses, having to deal with innumerable, different approaches to treating revenues and valuing assets. Second, it would be fraught with potential manipulation, inviting networks to creatively characterize revenues and assets in order to game the regulatory definition. Third, it would need to consider other related, and potentially significant, sources of income, such as from merchandising, program syndication, online activities, and the like. Finally, it would require networks to divulge highly sensitive confidential data not only to the Commission but potentially to adverse parties, which, as the Commission has learned from recent merger review proceedings, can cause significant controversy that interferes with, and significantly delays resolution of, the underlying matter.

Instead, INSP proposes that the Commission adopt the following definition of independent video programming vendor:

> Cable networks that are ***not*** any of the following: (1) a network in which an MVPD has an attributable interest; (2) a network in which an attributable interest is held by a company that also holds an attributable interest in, or has management, sales or marketing agreements with, one or more broadcast television stations that have retransmission consent rights that may be asserted against MVPDs and whose communities of license collectively include more than ten (10) percent of U.S. television households; or (3) a network in which an attributable interest is held by a company that has an attributable interest either in four or more other cable television networks or in a network that is ranked in the top thirty (30) Nielsen-rated cable networks.

This definition applies clear standards not subject to manipulation, does not entail the disclosure of confidential information, and rests on application of the Commission's long and well-established attributable interest principles. Networks that do not meet this definition – "conglomerate networks" – have sufficient marketplace leverage to resist MVPDs' demands and, therefore, do not need the protection of additional rules that are intended to protect their smaller, and more vulnerable, counterparts.

III. THE COMMISSION'S NPRM FINDINGS RECOGNIZE THE URGENT NEED TO LEVEL THE PLAYING FIELD FOR INDEPENDENT PROGRAMMERS

Through an extensive fact-finding process that included (i) initial and reply comments filed in response to the NOI, (ii) two workshops on the state of independent programming, (iii) other communications outside of the NOI comment cycle, and (iv) Commissioner Clyburn's Connected Community tour, a substantial and compelling evidentiary record was amassed that led the Commission, in the NPRM, to make three critical and indisputable findings. Taken together, these findings are already enough to mandate action by the Commission to adopt rules designed to provide independent programmers with fair and nondiscriminatory access to MVPDs' linear platforms.

A. The Commission is Statutorily Obligated to Promote a Diversity of Independent Programming Sources

First, the NPRM finds that the Commission has a statutory "***obligation to promote competition, programming diversity, and innovation in the public interest***."[5] This finding unquestionably is correct.

[5] NPRM ¶ 3 (emphasis added). The NOI similarly affirmed that a "central objective of multichannel video programming regulation is to foster a diverse, robust and competitive marketplace for the delivery of multichannel video programing." NOI ¶ 2.

Congress has charged the Commission with ensuring ownership diversity through multiple statutory provisions, including the following:

- 47 U.S.C. § 257(b): "[T]he Commission shall seek to promote the policies and purposes of this chapter favoring ***diversity of media voices***, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." (Emphasis added.)

- 47 U.S.C. § 521: "The purposes of this subchapter are to ... (4) assure that cable communications provide and are encouraged to provide the widest possible ***diversity of information sources and services to the public***." (Emphasis added.)

- 47 U.S.C. § 532(a): "The purpose of this section is to promote competition in the ***delivery of diverse sources of video programming*** and to assure that the widest possible ***diversity of information sources*** are made available to the public from cable systems in a manner consistent with growth and development of cable systems." (Emphasis added.)

The legislative history of the Communications Act further evidences the Commission's statutory duty with respect to independent programming. In 1992, Congress declared that "[t]here is a substantial governmental and First Amendment interest in promoting a ***diversity of views*** provided through multiple technology media."[6] Four years later, in enacting 47 U.S.C. § 257(a), Congress "require[d] the Commission to adopt rules that identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of … information services."[7]

Thus, Congress has made it abundantly clear through the Communications Act and its legislative history that greater consumer choice is not about just a multiplicity of channels, or even of genres of channels, from which viewers can choose, but rather diversity in the ***ownership*** of the ***sources*** of the programming that viewers receive. In other words, the availability of a large number of channels, even if they covered every conceivable programming niche, would not

[6] *See* Legislative History of the Cable Television Consumer Protection and Competition Act of 1992, 102 P.L. 385 at *1461 (Oct. 5, 1992) (emphasis added).

[7] *See* Legislative History of the Telecommunications Act of 1996, 104 S. Rpt. 230 (Feb. 1, 1996).

fulfill Congress' goal if the overwhelming majority of those channels was owned or controlled by a handful of media conglomerates. That condition would no more provide true media diversity than if a major city were served by four newspapers, but all of them were owned by the same company. True television diversity can be achieved only if independently-owned networks, whose programming expresses independent editorial viewpoints, are ensured fair access to the American viewing public – and that requires fair and nondiscriminatory access to MVPDs' linear platforms.

The important role of independent programmers and the daunting challenges they face were recognized by Commissioner O'Rielly, who, in dissenting to issuance of the NPRM, stated: "[Independent programmers] seek to fill niche consumer programming interests, often without diverse financial backing. In today's media environment, it's certainly difficult to generate such programming, survive a whirlwind of changing consumer tastes and technologies, and make the overall finances work." INSP agrees wholeheartedly.

B. Independent Programmers Face "Significant Challenges"

Second, the NPRM makes the important finding that "***the record indicates that certain participants in the video marketplace, particularly independent content producers … are facing significant challenges***." NPRM ¶ 6 (emphasis added). While indisputably true, this finding significantly understates the perilous reality of the marketplace for independent programmers.

Independent programmers are being buffeted on two fronts. On one side are independent programmers' direct competitors – "conglomerate programmers." This group includes, principally, (1) companies that own large numbers of cable networks, and (2) media companies that own or are affiliated with multiple cable television program networks or with broadcast television stations and/or broadcast television networks. The tremendous marketplace power held by these conglomerate programmers enables them to occupy the overwhelming majority of channel capacity on MVPDs' platforms and to exercise inordinate influence – indeed, control -- over MVPDs' selection of the networks they distribute to the American viewing public. On the other side are MVPDs, who have been either unable or symbiotically unwilling to resist conglomerate programmers' tying and bundling demands for ever-increasing portions of MVPDs' capacity. These market forces are squeezing independent programmers out of the multichannel marketplace, to the point where they represent little of the content that is available to American television viewers on MVPD platforms and their very existence is in serious jeopardy.

Two recent examples of independent networks that were unable to survive are Pivot, which ceased operations on October 31, 2016, and Al Jazeera America, which ceased operations on April 12, 2016. The reasons for, and implications of, these networks shutting their doors, were addressed in the 2016 edition of SNL Kagan's *Economics of Basic Cable Networks*[8]:

> 2016 has also been a notable year on the deal front in that two networks which each had more than 50 million subs (Al Jazeera America and Pivot), finding no buyers for their operations, decided simply to shut the doors. This is an unprecedented move. Historically, channels this large have been able to find a buyer for at least $10/sub and someone would come in to rebrand them. Not this time
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> We project these two represent just the beginning of a new wave of cable network shutdowns. With cord cutting, cord shaving and cord nevers cutting into cable network ad revenue and affiliate fees, this business is getting extremely tough.

This analysis provides a vivid picture of a potentially dire future for independents (and all they represent) unless the Commission acts swiftly.[9]

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[8] SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 150.

[9] The marketplace has become so challenging that even NBCUniversal has announced that it is pulling the plug on its Esquire Network. *See* http://money.cnn.com/2017/01/18/media/esquire-

The state of independent programming is alarming. Today, of the 254 television networks measured by comScore/Rentrak, 164 (65 percent) are owned by only eleven large media conglomerates, while only 90 (35 percent) of these networks are independently owned.[10] For example, Disney, Viacom and Time Warner each own 21 networks, Liberty Media owns 18 networks, News Corp. owns 15, CBS owns 14, and Discovery owns 13 networks. As a practical matter, this means that the lion's share of MVPD channel capacity is being consumed by a small number of media conglomerates, and this trend continues to grow.

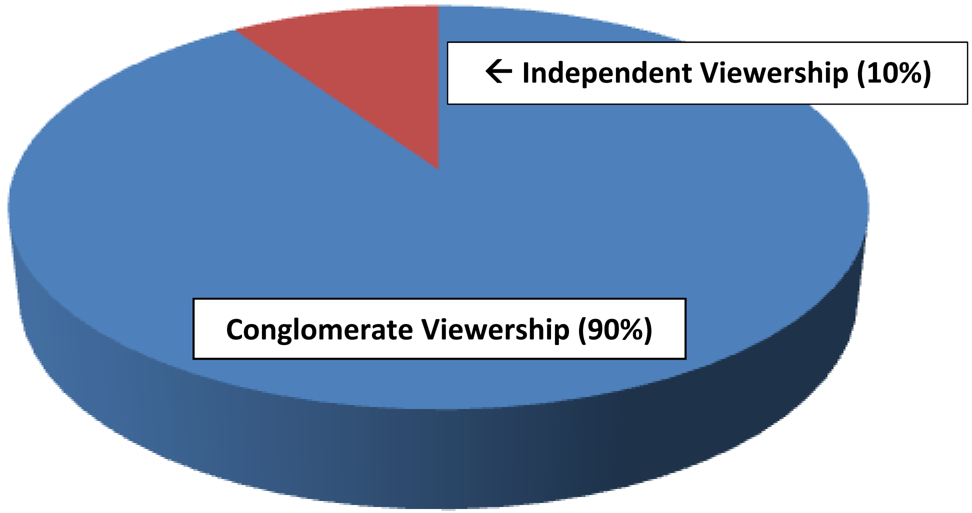
Data comparing actual television viewership between conglomerate and independent programmers is even more ominous. As of September 2016, nearly ***90 percent*** of the total television viewing of the 254 networks measured by comScore/Rentrak was of programming owned by the same eleven largest conglomerate programmers, leaving only ***10 percent*** of total television viewership scattered among the 86 independent programmers.[11] This outsized viewing is due in significant part to the conglomerates receiving preferential treatment by MVPDs in decisions regarding carriage, packaging, tiering and channel selection – which is attributable to the leverage conglomerates enjoy from their ownership of multiple networks (including powerhouse, marquee networks), their affiliation with broadcast networks or television stations, or their vertical ownership[12] by MVPDs.[13]

network/index.html. If a company with the size, scale and resources of NBCUniversal has decided that one of its networks cannot remain viable, how are far smaller, independent program networks to survive unless the Commission adopts regulations that address the conditions described in these comments?

[10] September 2016 SNL Kagan ownership data aggregated by INSP.

[11] Sources: viewership data – comScore/Rentrak National TV Essentials, September 2016; network ownership data – SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.). Data aggregated by INSP.

[12] In its most recent *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247 (Jan. 17, 2017) ("*2016 Annual Assessment*"), at ¶ 24, the Commission noted an increase in MVPD ownership of cable networks, with "recent data show[ing] that vertical integration increased for MVPDs" with "159 national networks affiliated with the top six cable MVPDs" and six national networks affiliated with a DBS operator. *See also id.* at Appendix B-1 ("National Video Programming Services Affiliated with One or More MVPDs").



When *prime-time* viewing is considered, the dominance of the media conglomerates is even more striking: just ten owners[14] account for 95 percent of the prime-time ratings of the top-50 networks.[15] This concentration of ownership and viewership is powerful evidence of the sheer dominance of conglomerate programmers in, and the resulting growing exclusion of independent programmers from, the multichannel marketplace.

Conglomerate dominance also is demonstrated by trends in media ownership. Within the past several years, at least twenty-six major networks have been sold, some more than once, with conglomerates overwhelmingly dominating the acquisition pattern and further strengthening their hold on the multichannel marketplace.[16]

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[13] MVPDs also are forced to pay conglomerate programmers for non- or under-performing channels, making those funds unavailable to compensate certain independent networks whose ratings, viewership and marketplace demand exceed those of some conglomerate networks. This situation limits consumer choice, lessens competition, creates an oligopoly market, and squeezes independent programmers out of the marketplace.

[14] The ten owners include Disney, Fox, CBS, Time Warner, Viacom, Discovery, Scripps, Univision, NBCU, and Liberty Media.

[15] SNL Kagan data presented by Tasneem Chipty, Analysis Group, PowerPoint presentation at FCC Media Bureau State of the Video Marketplace Workshop, page 4 (March 21, 2016), available at: https://transition.fcc.gov/bureaus/mb/policy/video_marketplace/presentation_Chipty_2016.pdf.

[16] SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 149. For example, in 2014, independent YES Network was sold to 21st Century Fox and Discovery acquired independent network

The data reveals a broken market. In today's skewed playing field, the media conglomerates exercise their oligopoly power to enjoy every conceivable advantage over independents, including: guaranteed access to MVPD platforms; tying of carriage of their weaker channels to their marquee networks; preferred channel positioning, tiering, packaging and license fees; cross-promotion; and large programming production budgets funded by revenues from advertising and hefty license fees that their oligopolistic scale commands. It is therefore understandable why analysts at SNL Kagan predict that "networks in the middle and at the lower end continue to suffer" and foresee "some cable networks completely shutting down."[17]

If consummated, the recently proposed acquisition of one of the largest conglomerate programmers – Time Warner, which owns 21 networks, including marquee networks such as CNN, HBO and TBS – by the nation's largest MVPD – AT&T, which has over 25 million subscribers[18] – will only exacerbate an already dire situation for independent programmers. The combined entity would have strong economic incentive to favor its cadre of affiliated networks at the expense of independents.[19] While INSP has not taken a position regarding this particular merger, what is important for the Commission to note here is that mergers such as these, and the impact that they unavoidably and indisputably have on the marketplace, demand that the

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The Hub. Similarly, in 2016, Sinclair Broadcast Group acquired the independent network Tennis Channel. *Id.* at 162.

[17] SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 13.

[18] As of June 30, 2016, AT&T reported that it had an industry leading 25.3 million subscribers. *See* http://www.fiercecable.com/cable/at-t-adds-342k-directv-subscribers-q2-loses-391k-u-verse-tv-subscribers.

[19] Other recent examples of MVPD discrimination on the basis of non-affiliation abound. For example, in his Initial Decision in the program access proceeding involving Game Show Network ("GSN") and Cablevision, the Commission's Chief Administrative Law Judge found that Cablevision discriminated against GSN in its decision to move the network to a less favorable tier on the basis of GSN's lack of affiliation with Cablevision. *Game Show Network vs. Cablevision Systems Corp.*, Initial Decision of Chief ALJ Richard L. Sippel at ¶¶ 99-107 (rel. Nov. 23, 2016), available at: https://ecfsapi.fcc.gov/file/1123308628979/FCC-16D-1A1.pdf.

Commission amend its rules in order to protect independent networks and the viewpoints that they reflect.

The ever-increasing level of media concentration in the hands of a few large conglomerates is a ***bipartisan concern***, which officials from across the political spectrum have noted with alarm. Senators Mike Lee (R-UT) and Amy Klobuchar (D-MN), the chair and ranking member, respectively, of the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, issued a joint statement about the proposed AT&T – Time Warner merger, expressing concern that that additional industry consolidation might "block or co-opt new options for receiving video content or exercise disproportionate control over the video content market."[20]

C. The Commission Should Act Decisively to Remove the Marketplace Barriers Facing Independent Programmers

Third, the NPRM finds that the Commission should act "***to remove marketplace obstacles that may hinder independent programmers from reaching consumers***." NPRM ¶ 3 (emphasis added). Taken together with the Commission's other NPRM findings, it is axiomatic that the Commission should act – indeed, given its statutory duties, ***must*** act – to remove marketplace obstacles that threaten the survival of independent programmers. Although the NPRM proposes limited action by the Commission, the proposed rule changes – although a step in the right direction – would provide no relief against the primary threat to independent programmers: the forced tying and bundling practices of large media conglomerates.

[20] *See* http://www.klobuchar.senate.gov/public/news-releases?ID=03CDAF78-87EA-4820-9201-5A9D331CBED1.

IV. THE WIDESPREAD PRACTICE OF BUNDLING BY CONGLOMERATE PROGRAMMERS THREATENS THE SURVIAL OF INDEPENDENT PROGRAMMERS

For more than the past half century, the television screen in U.S. homes has been the dominant means by which Americans secure news and entertainment programming, and it will continue to be so for the foreseeable future notwithstanding recent innovations in digital, online and wireless video distribution. In its infancy, "television" delivery consisted essentially of a handful of nationally-distributed broadcast networks. However, the advent of cable television and direct broadcast satellite ("DBS") technologies triggered a multichannel video industry evolution in which scores of *independently-owned* cable networks were launched.

These independent programmers, with their unique editorial and creative viewpoints, reflected virtually every face of our diverse American society. Whereas the large conglomerate programmers developed networks that have the broadest possible appeal, resulting in a homogenization of content, independents brought forth a cornucopia of diverse channels aimed at every conceivable focus of viewer interest, with specialized channels covering almost every conceivable genre – books, horses, the space program, gay and lesbian life, martial arts and countless others – differentiation that rarely will be found among the channels controlled by media conglomerates.

But the great gains in diversity and true consumer choice achieved over the past sixty years are now threatened as the ownership of television programming networks has become increasingly concentrated in a few powerful media conglomerates.[21] Today, just the eight largest

[21] As noted by an industry analyst at the Media Bureau's workshop on the state of the video distribution marketplace: "As distribution has become more competitive over the past 20 years, owners of marquee programming have gained bargaining leverage. As certain content owners have become more important to MVPDs, the potential for anticompetitive wholesale bundling has increased." *See* Tasneem Chipty, Analysis Group, PowerPoint presentation at FCC Media Bureau State of the Video Marketplace

media conglomerates collectively own an interest in 145 television networks (see p. 9, *supra*), and each of them owns one or more powerhouse, "must-have" networks.[22] Adding to these companies' muscle, most have interests in movie studios, major broadcast networks and/or professional sports teams. The control of these conglomerates also has been expanded through their purchase of various, previously "independent" networks during the course of the past several decades. These purchases have served to silence some independent voices, and increase the concentration of power for conglomerates.[23]

The NPRM requests comment about the practice of bundling by conglomerate programmers. NPRM ¶ 33. INSP explains below how these forced tying and bundling practices are, by far, the most significant threat to independent programmers, how these practices harm television viewers, and why the Commission must take action to protect independent programmers and the viewers they serve.

A. Conglomerates' Tying and Bundling Practices Deny Independent Programmers Fair Access to MVPDs' Linear Platforms on Nondiscriminatory Terms

The NPRM asks a number of questions regarding media conglomerates' "bundling practices", including the following:

- Whether conglomerates' "bundling practices affect MVPDs' ability to carry independent programmers"?
- Whether "bundling by large programmers [is] as widespread as the record suggests"?
- "How does bundling impact consumer costs, choice, and access to diverse programming?"

Workshop, page 8 (March 21, 2016) available at: https://transition.fcc.gov/bureaus/mb/policy/video_marketplace/presentation_Chipty_2016.pdf.

[22] For example, Disney owns ESPN and ABC Network, Viacom owns Nickelodeon and Comedy Central, CBS owns the CBS Network, News Corp. owns Fox Network, Discovery Communications owns the Discovery Channel and TLC, and Time Warner owns TNT and TBS.

[23] For example, the Disney-owned cable network Freeform (formerly ABC Family) originated as an independent network CBN Satellite Service before being acquired by Disney.

- “Are there other marketplace conditions that magnify the effects of … bundling?” NPRM ¶ 33.

The unfortunate reality is that bundling is a pervasive and coercive practice, with media conglomerates using the threat of withholding a “must-have,” marquee channel to force MVPDs to carry other, unproven channels owned by conglomerates that the MVPDs otherwise would not choose to distribute, often on terms to which the MVPDs otherwise would not agree.

The major multi-network programmers are able to use their flagship networks as leverage to coerce preferential carriage terms from MVPDs for their full roster of associated networks without regard to the quality of, or consumer demand for, many of those channels – even those with lesser viewership and/or lower ratings than their independent competitors. These actions, made possible by their concentration of market power, give conglomerate programmers’ *de facto* control over MVPDs’ programming decisions regarding content selection and how such programming is sold to consumers (through tiering and packaging requirements), and ultimately over viewer choice. Consolidation among content companies has resulted in a handful of companies controlling the overwhelming majority of channel positions on cable systems and DBS, to the exclusion of independent programmers, and dominating actual television viewing in the United States. While that situation may benefit the conglomerate programmers’ shareholders, it does not serve the interests of the American viewing public.

INSP believes the most serious barriers raised by MVPDs to independent channels’ distribution in fact generally are not of the MVPDs’ own making or design. Rather, they flow from conglomerate programmers’ demands that MVPDs allocate to them unduly large blocks of platform capacity, and pay them disproportionately high license fees for their multiple networks, including forcing MVPDs to pay discriminatorily preferential license fees for carriage of unwanted channels and underperforming channels (when compared to the ratings and viewership of many independent networks). This, in turn, has forced MVPDs to offset the excess costs imposed on them by conglomerate programmers by paying disproportionately low, or even no, license fees to independent programmers,[24] and this unleashes a vicious cycle in which independent networks are denied the license fees and advertising revenues needed to produce original programming necessary to compete with their larger conglomerate counterparts. The remainder of the MVPDs' excess costs of carrying unwanted conglomerate programming channels that have not been shifted to independent programmers are passed on by MVPDs to their subscribers, contributing to the continuously escalating fees that consumers must pay for their cable and satellite bundles, and denying them true source diversity in their access to television content.

Conglomerate programmers also impose tier placement requirements on MVPDs that mandate carriage of the bundled, tag-along networks in MVPDs' highly distributed tiers, with advantageous channel placement – treatment that often is unwarranted by the networks' ratings – to the exclusion of independent programmers that are more highly desired by viewers, as demonstrated by ratings, but have no leverage. This results in independents being banished to less widely-distributed tiers, or being assigned disadvantageous channel placement if they get carriage at all. Here too, this is accomplished either through conglomerate programmers' direct demands or through pricing schedules that make it uneconomic for MVPDs to resist such demands. For example, in a recent carriage dispute between Viacom and Cablevision, Viacom demanded ***one billion dollars ($1,000,000,000.00) more*** in license fees for just Viacom's most

[24] According to analysis by SNL Kagan, in 2015, ad revenue comprised only 38% of cable network revenues and that figure is expected to decline in the future. SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 12. Declining advertising revenues make license fees even more important for cable networks and magnify the impact of discriminatorily low, and in most cases no, license fee payments to independent networks.

popular channels (Nickelodeon, MTV, BET and Comedy Central) than for a bundle that included 14 additional, unwanted networks.[25] Faced with such punitive demands by conglomerate programmers, and the prospect of losing must-have marquee channels, MVPDs almost always surrender to conditions that ultimately harm not just the MVPDs but independent networks and the viewers who are deprived of their services.

Bundling extends to conglomerate networks owned by companies that also own or control broadcast television stations with retransmission consent rights. These companies are widely known to tie the grant of retransmission consent rights for "must-have" broadcast stations to MVPDs' agreement to carry undesired affiliated non-broadcast networks, and to broadcasters' digital multicast channels, thereby further limiting access by independent networks to MVPD platforms.[26]

The detrimental impact on independent programmers is obvious. When, for example, an MVPD is coerced to carry all 21 of Viacom's channels, all 21 of Disney's channels, all 18 of Liberty Media's channels, all 15 of News Corporation's channels, all 21 of Time Warner's channels, all 14 of CBS's channels and all 13 of Discovery's channels, the MVPD has committed 123 channel slots to just seven programming sources, and thereby has foreclosed scores of independent programmers' merit-based access to those channel positions. When the top eleven conglomerate owners are considered, they occupy 164 linear channels and have the

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25 *See* http://www.freepress.net/blog/2013/05/31/broadcast-broadband-and-bundle-bloat.

26 *See, e.g., Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association (filed Dec. 1, 2015) at 19 ("ACA members operating a cable system that carries both a Fox O&O and one or more Fox RSNs report to ACA that they negotiate with a single division at Fox that is responsible for carriage agreements for its broadcast stations, regional sports networks, and its national cable networks."); *2016 Annual Assessment*, at ¶ 84 (noting the extensive ownership by broadcast networks and broadcast licensees of cable networks), at ¶ 126 (noting that broadcasters gain leverage by combining their negotiation with MVPDs of retransmission rights and rights to distribute their affiliated cable networks), and at Appendix B-2 ("National Networks Affiliated with a Television Network, Broadcast Television Licensee, or Other Media Company").

primary, i.e., preferential, locations on viewers' "dials" and in channel guides. This essentially precludes most independent program networks from the linear platforms of most MVPDs, and almost always from the most widely-distributed tiers, and clearly does not serve to promote the source diversity mandated by Congress in the Communications Act.

This accounts for the high mortality rate among independent networks. Analysis presented at the Media Bureau workshop on the state of the video marketplace shows the stark difference in survival rates between new networks launched by independent owners and those launched by media conglomerates. Of the 68 networks launched from 2005 to 2007, the survival rate for independent networks was only 55 percent, compared to an 86 percent survival rate for conglomerate networks.[27] The survival rate for independents has grown even worse in the following years, as concentration among media conglomerates – and therefore the market power they wield – has increased.[28] Independent networks also tend to be "collateral damage" in disputes between programming conglomerates and MVPDs. When MVPDs are forced to take on unwanted networks, according to SNL Kagan, "independently owned cable network are more vulnerable to being dropped than networks from a major provider with negotiating leverage."[29] A recent example is Ovation, an independent network that was dropped from DISH Network's line-up in 2015.

In INSP's experience, MVPDs have cited bundling and tying as one of the main reasons, if not the principal reason, why they are unable to launch INSP and other independent networks, provide them with broader distribution, provide more desirable channel positioning, or fairly

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[27] There were 47 independent networks launched, of which only 26 survive today, compared with the launch of 21 conglomerate networks, of which 18 survive today. *See* Tasneem Chipty, Analysis Group, presentation at Media Bureau State of the Video Marketplace Workshop, page 4 (Mar. 21, 2016) available at: https://transition.fcc.gov/bureaus/mb/policy/video_marketplace/presentation_Chipty_2016.pdf.

[28] For example, independent networks Al Jazeera America and Pivot ceased operations in 2016. *See* Section III(B), *supra*.

[29] SNL Kagan, *Economics of Basic Cable Networks* (2016 ed.), at 40.

compensate them with appropriate license fees when compared to the carriage terms garnered by conglomerate networks. If conglomerate programmers' hold on the overwhelming majority of MVPDs' channels were broken, and a level playing field ensured, independent programmers finally would have a fair opportunity to compete for access to MVPDs' platforms on nondiscriminatory terms.

B. Conglomerates' Tying and Bundling Practices Raise Consumer Costs, Limit Consumer Choice, and Deny Consumers Access to Diverse Sources of Programming

The NPRM also requests comment about forced bundling's impact on "consumer costs, choice and access to diverse programming." NPRM ¶ 33.

The victims of conglomerate programmers' coercive tying and bundling practices are not only independent networks, whose commercial viability depends on having fair and nondiscriminatory access to MVPDs' platforms, but American television viewers. For, in the end, television consumers are forced to buy bundles of conglomerate programming they don't want, and denied the opportunity to watch the independent programming channels they do want, that would provide them with genuinely diverse and differentiated sources of programming, and would cost them far less. Undoubtedly, forced carriage of unwanted channels raises consumers' costs, and denies viewers access to the diverse content and editorial viewpoints that independent programmers provide.

As the Commission considers these important issues, it is crucial to recall that what is at stake is not only the interests of independent programmers – who, in their own right, are worthy of protection as First Amendment speakers – but also the welfare of ***American consumers***. The Commission should ensure that the viewing public has access to ***real*** diversity in viewing ***sources***, not just the illusion of choice presented when the overwhelming majority of channels to which viewers have access on MVPD platforms is controlled by a handful of content conglomerates, and MVPDs are either powerless or unwilling to resist such leverage.

INSP is a case in point. Television content has continued to grow increasingly violent and coarse, with programming today routinely laced with nudity, profanity, gore and/or crassness that could not have been imagined 25 years ago. Research consistently has demonstrated that such programming does not represent the values or preferences of tens of millions of American viewers, who are entitled to have a source of family-friendly, wholesome viewing that better reflects their moral compass. This research has been confirmed by INSP's experience, with substantial ratings growth and one of the highest viewer loyalty and repeat viewership rankings of any network today. Yet, INSP receives no license fees from its MVPD distributors, when those same distributors are forced by conglomerate programmers to carry, and pay significant license fees, for inferior bundled networks as a condition for the privilege of being allowed to carry the conglomerates' marquee channels.

INSP expresses its editorial viewpoint, and seeks to serve the interests of its viewers, through its selection of content, including new, original programming it produces, such as "*State Plate*", "*Handcrafted America*", and "*Brush of Honor*".[30] But it cannot continue to do so if it is denied access to MVPD platforms or if access is conditioned on discriminatory and unreasonable carriage terms that are substantially inferior to the terms enjoyed by programming conglomerates' networks with lower ratings.

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[30] In its original series "*State Plate*", host Taylor Hicks – a platinum selling musician and restaurateur – tours America, sampling states' most symbolic and popular foods. In INSP's series "*Handcrafted America*", host Jill Wagner travels America to seek out talented artisans who continue to make products the traditional way, by hand, creating sought-after contemporary classics. In INSP's original series "*Brush of Honor*", artist Phil Taylor travels across the country to paint portraits of America's fallen military heroes and hand-deliver them to surviving family members. Other programming featured on INSP includes family-friendly classics such as "*Matlock*", "*Walker, Texas Ranger*", and "*The Waltons.*"

Unless the existing barriers that confront independent programmers are removed, the content provided over mainstream television platforms to the American viewing public will be controlled by fewer and fewer media conglomerates, and independent programmers and new entrants will, at best, be relegated to the margins. It is of paramount importance that the Commission's rules be reinforced with provisions that will ensure the American viewing public's access to diverse ***sources*** of programming and the independent voices that they express.

C. Recommended Action

Faced with the necessity of having conglomerate programmers' must-have, marquee networks, MVPDs are forced to give the media conglomerates discriminatorily favorable access to, and preferential terms governing – some would say *de facto* control over – MVPD distribution platforms. The resulting exclusion of independent programmers, and the unfavorable terms they receive when they are carried, has foreclosed them from growing, indeed even sustaining, existing channels or launching new ones, and from producing the differentiated original programming that the American public craves. Denied treatment comparable to conglomerate programmers' own networks, independent programmers operate at a profound disadvantage, and their continued existence – and the viewing public's access and opportunity to choose from among truly diverse media voices – is in jeopardy.

This flawed video marketplace is accompanied by an equally flawed regulatory system in which the Commission operates under rules that are inadequate to provide effective remedies to independent programmers that have been victimized by conglomerate programmers' oligopolistic actions.

Accordingly, INSP proposes that the Commission should amend the program carriage rules to provide, at minimum, the following:

- MVPDs should be required to engage with independent programmers in *bona fide* negotiations to attain carriage terms (including, for example, license fee compensation, tier placement, packaging, channel positioning and alternative means of distribution) that are fair, reasonable and nondiscriminatory in comparison to those received by conglomerate programmers' networks.

- MVPDs should be required to engage in transparent evaluation and selection processes.

- Nondiscrimination should be determined based on a comparison of objective factors such as ratings, consumer demand, diversity and uniqueness of programming, and similar verifiable criteria. This can be developed based on credible, independent sources (*e.g.*, audience data from Nielsen and/or comScore, and industry and consumer data compiled by SNL Kagan).

- The Commission should provide a remedial complaint process that enables independent networks that have been treated in a discriminatory manner to obtain timely, cost-effective relief free of fear of retaliation.[31]

V. THE COMMISSION SHOULD ADOPT ADDITIONAL RESTRICTIONS ON MOST-FAVORDED NATION PROVISIONS AS APPLIED TO INDEPENDENT PROGRAMMERS

INSP is encouraged that the NPRM recognizes the litany of significant harms that most-favored nation provisions inflict on independent programmers, and particularly its finding that consumers "ultimately feel the negative effects most acutely." NPRM ¶ 2. As the Commission found, these harmful effects include the following:

- MFNs "appear designed to discourage or foreclose the wider distribution of video content, including on online platforms." NPRM ¶ 19.

- MFNs "make it challenging for programmers to achieve a profitable level of carriage." NPRM ¶ 7.

- MFNs "can apply upward pressure on both wholesale and retail prices for program content by reducing a programmer's incentive to cut its carriage rate …" NPRM ¶ 20.

- MFNs "limit the incentives and ability of independent programmers to experiment with innovative carriage terms." NPRM ¶ 2.

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[31] *See* Section VII, *infra*.

- MFNs "deprive consumers of the benefits that otherwise would flow from enhanced competition in the video and distribution marketplace [including] expanded choice in the sources and variety of video programming … and lower process for video programming services." NPRM ¶ 2.

INSP supports the Commission's proposal to prohibit "unconditional" MFNs.[32] But the changes contemplated by the Commission do not go nearly far enough. As INSP explained in its comments in response to the NOI, MFNs harm independent programmers and viewers in a variety of ways, including the following:

- MFNs discourage independent programmers from selectively offering discounted prices and better terms to MVPDs;
- MFNs discourage independent programmers from introducing innovative new non-price terms;
- MFNs facilitate standardization of price and non-price terms, and can facilitate *de facto* collusion among MVPDs;
- MFNs jeopardize diversity among television programming sources; and
- MFNs inhibit the entry of new competitors into the multichannel video distribution market.[33]

MFNs, as employed in the multichannel television industry, are anticompetitive and not in the public interest because of the harm they cause to independent networks and American television viewers, and the absence of countervailing benefits. The NPRM notes that MVPDs assert, with respect to MFNs, that "the ability to adjust contract terms benefits independent programmers by increasing their chances of achieving carriage and by facilitating longer term carriage agreements, which ultimately benefits consumers." NPRM ¶ 13. INSP disagrees. This is a disingenuous, self-serving distortion of how MFNs are applied and how they impact

[32] *See* NPRM ¶ 18. The NPRM defines an "unconditional" MFN provision as one "that entitles an MVPD to contractual rights or benefits that an independent video programming vendor has offered or granted to another video programming distributor, without obligating the MVPD to accept any terms and conditions that are integrally related, logically linked, or directly tied to the grant of such rights or benefits in the other video programming distributor's agreement, and with which the MVPD can reasonably comply technologically and legally."

[33] *See Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket 16-41, Comments of INSP, LLC (filed March 30, 2016) at 19-23.

independent networks. In INSP's experience, MFNs have not resulted in INSP (or for that matter, any other independent networks) gaining *any* additional carriage or longer-term carriage; rather, MFNs simply have been imposed on a take-it-or-leave-it basis with no additional consideration given in exchange for acceptance of an MFN's onerous requirements and burdensome consequences. In any event, any asserted benefits asserted to flow from MFNs are far outweighed by their evils.

Accordingly, in addition to the proposed prohibition on unconditional MFNs, INSP suggests that the Commission should restrict MVPDs' use of predatory MFN clauses in distribution deals with independent programmers, for example, by:

- prohibiting "cherry-pick" MFNs,[34] "MFNs on MFNs,"[35] and other MFN requirements that provide MVPDs with anything more than traditional volume-based MFN protections;

- requiring that an MVPD agree to comply with all terms, conditions and obligations that "are integrally related, logically linked, or directly tied" (NPRM ¶ 18) to the more favorable provision;

- requiring that volume-based MFNs imposed by an MVPD on an independent programmer be in material parity with, and not more burdensome than, the least burdensome volume-based requirements that the MVPD applies to any of the twenty (20) largest cable networks it carries; and

- requiring that any MVPD that requires an MFN from an independent programmer be required in turn to give the programmer an MFN guaranteeing that such programmer's terms will be no less favorable than the best terms that the MVPD

[34] "Cherry pick" MFNs often allow MVPDs to pick and choose the terms as to which they invoke MFN protection, and often provide that the MVPD does not have to satisfy conditions relating to the more favorable terms in order to receive their benefits. These provisions give no consideration to what was bargained for by another MVPD to receive the more favorable term(s). By allowing each MVPD to pick, on a provision-by-provision basis, terms from all of a network's distribution contracts that are more favorable to another MVPD, the effect is that a network's ***worst*** terms from any deal become its only terms in all contracts with ***all*** MVPDs.

[35] Because distributors generally are able to impose "MFNs on MFNs", the MFNs of each major MVPD in the market often will have very similar scope and coverage. "MFNs on MFNs" lead to standardization among competing MVPDs not only of MFN provisions, but of most of the material economic and non-economic terms of distribution agreements.

> gives to any other comparable network (as determined by ratings or other objective measure).

The Commission also requested comment on whether it should "prohibit only unconditional MFN provisions that apply to terms an independent programmer has negotiated with an OVD?" NPRM ¶ 21. For the reasons discussed above, clearly the answer is no. The pernicious effects of MFN provisions – particularly unconditional MFN provisions – extend well beyond the narrow scope of independent programmers' contractual arrangements with OVDs. Narrowing the scope of the proposed rule to only terms negotiated with an OVD would effectively eviscerate an already too narrow rule.

While independent programmers sorely need the relief described above, such protections need not extend to MVPDs' dealings with conglomerate programmers, since the latter have adequate leverage to resist unreasonable requirements without need of regulatory intervention.

VI. THE COMMISSION SHOULD ADOPT ADDITIONAL RESTRICTIONS ON ADM PROVISIONS AS APPLIED TO INDEPENDENT PROGRAMMERS

In the NPRM, the Commission correctly found that ADM provisions are being used to impede competition among new online competitors and limit the ability of independent programmers to reach viewers through alternative distribution channels:

> Based on the record, it appears that two of the principal tools used by MVPDs that impede competition and consumers' access to independent programming sources are MFN and ADM provisions. In particular, the record reveals that certain MVPDs have used their bargaining leverage vis-à-vis independent programmers to exact unconditional MFN clauses and/or unreasonable ADM provisions that hamper the ability of programmers to experiment with online distribution. Such contractual provisions make it challenging for programmers to achieve a profitable level of carriage, or to secure carriage without contracting away their freedom to present content to a broader audience via the Internet. Restrictions placed on programmers by unconditional MFN and unreasonable ADM obligations in turn create barriers to entry and hinder the growth of OVDs by restraining their access to content and precluding them from entering into mutually beneficial agreements with independent programmers.

NPRM ¶ 7 (footnote omitted).

While some MVPDs assert that ADM "provisions are intended to allow MVPDs to protect their investments in programming" (NPRM ¶ 14), the Commission has appropriately recognized that these provisions often go far beyond what is needed to "protect" such investments and can have harmful effects.[36] Any needed protection should come through traditional short-term "windows," not through the oppressive, anticompetitive ADMs that some MVPDs impose on independent programmers.

The NPRM proposes to prohibit "unreasonable" alternative distribution method provisions that restrict a programmer's ability to distribute its programming via alternative platforms, such as OTT distribution. NPRM ¶ 23. Although alternative distribution platforms are not *today* a substitute for access to MVPDs' linear platforms, they are certain to become increasingly important in the long run, and it is crucial, for several reasons, that independent programmers' use of alternative distribution methods not be obstructed, during these formative years, by restrictive ADM provisions. INSP therefore supports the Commission's proposed ban on unreasonable ADM provisions, including the four categories of provisions that the Commission found to be presumptively unreasonable.[37] However, the Commission should also consider additional rules to protect independent programmers against overly restrictive ADM provisions. For example:

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[36] *See 2016 Annual Assessment,* at note 63, where the Commission recognizes that ADMs and MFNs can "potentially create barriers to entry and hinder the growth of OVDs by restraining their access to content and precluding them from entering into mutually beneficial agreements with independent programmers."

[37] *See* NPRM ¶ 24, finding that the presumptively unreasonable ADM provisions appear to include those that "(i) bar an independent programmer from licensing content, for an extended time period or indefinitely, to an OVD that distributes content for free to consumers; (ii) bar an independent programmer from licensing content, for any period of time, to an OVD that distributes content to paying subscribers; (iii) bar an independent programmer from licensing content to an OVD unless or until the OVD meets conditions that are difficult to satisfy in a timely manner or are designed to undermine the OVD's ability to compete; or (iv) provide for any pecuniary or non-pecuniary penalty or adverse impact on an independent programmer for the provision of its video programming to an OVD." (Footnotes omitted).

- MVPDs should not be allowed to prevent independent networks from presenting via ADMs reasonable portions of programming that currently is being distributed on MVPDs' platforms, for purposes of promoting viewer interest in such programs, testing new distribution platforms and methods, and developing additional revenue streams.

- Independent networks should be protected from being coerced to assign to MVPDs the rights to distribute the networks' content over alternative distribution platforms.

VII. THE COMMISSION SHOULD ADOPT PROCEDURES THAT PROVIDE INDEPENDENT PROGRAMMERS WITH EFFICIENT AND EFFECTIVE REVIEW OF, AND RELIEF FROM, UNFAIR AND DISCRIMINATORY PROGRAM CARRIAGE PRACTICES

The Commission recognizes that small, independent programmers may be less likely to seek relief through the filing of a program carriage complaint, due both to the costly and time-consuming nature of such proceedings[38] and the prospect of retaliation. *See* NPRM ¶¶ 17, 32, 33. These realities underscore the need to provide remedial provisions that can be efficiently and effectively exercised by independent programmers, without fear of retaliation. Without such procedures and safeguards, the changes that the Commission is considering regarding bundling, MFNs and ADMs would be hollow indeed.

INSP submits that the Commission's program carriage rules should be amended to include the following safeguards for the protection of independent programmers:

- **Expedited Commission Review**. The rules should provide for the prompt review of unlawful discrimination by MVPDs with a defined timetable for agency action, including the availability of interim relief (including standstill provisions) while proceedings are pending, followed by expedited court review, if necessary.

- ***Prima Facie* Standard**. The rules should provide that a *prima facie* case of discrimination can be established based on affiliation, utilizing the circumstantial evidence standard outlined in the Commission's 2011 *Program Carriage Order*[39] and codified in 47 C.F.R. § 76.1302(d).

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[38] For example, the program carriage complaint described above in note 19was brought by GSN in October 2011. That proceeding is ongoing ***more than five years later***, and remains subject to further appeal.

[39] *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order

- **Arbitration**. The Commission should provide that, if negotiations between an independent programmer and an MVPD fail to produce a mutually acceptable set of price, terms and conditions for carriage by the MVPD, the independent programmer will have the right to submit a dispute to commercial arbitration regardless of whether there is an arbitration provision in any contract between the parties. The results of any such arbitration should be binding on the parties for at least three years.

- **Non-retaliation**. The rules should provide that no MVPD shall retaliate against an independent programmer for exercising any rights, including without limitation filing and prosecuting, in good faith, a complaint with the Commission alleging a violation of any program carriage rule, commencing an arbitration, or obtaining a remedy pursuant to the program carriage rules.

- **Sunset**. The Commission should provide that the expanded regulatory protections for independent programmer will sunset after a period of seven years if the Commission affirmatively finds that they no longer are necessary, any such finding to be based on consideration of then-existing levels of concentration among MVPDs and conglomerate programmers, the extent of carriage of independent programmers by MVPDs, the development of commercially viable alternative distribution platforms for independent programmers, and similar factors.

VIII. CONCLUSION

The plight of independent programmers, and the American television viewers they seek to serve, appropriately is a bipartisan concern. The record in this proceeding has revealed a broken marketplace in which increasingly powerful conglomerate programmers consume an ever-growing share of MVPD capacity, creating almost insurmountable barriers for independent programmers. Presently, nine out of every ten television viewing hours are on conglomerate programming networks. Given the overwhelming economic advantages enjoyed by conglomerate programmers over independents, and further consolidation in the media industry, this situation is all but certain to worsen, and it is unrealistic to expect market forces to provide a remedy.

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in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494 (2011).

The rule changes that INSP proposes will not require the Commission to regulate the prices and terms of wholesale or retail program transactions. Rather, they require only that conglomerate programmers and MVPDs refrain from the oppressive, discriminatory practices that characterize the video marketplace today, and that they treat independent programmers in a fair and nondiscriminatory manner.

The Commission must act promptly. While experimentation in the marketplace is occurring, with MVPDs testing consumer reaction to OTT, “skinny bundles” and other new offerings, skinny bundles are of no benefit to independent programmers if their networks are not included, and there is no indication that the current structure will change sufficiently for a number of years to eliminate, or even materially lessen, independent program networks’ need for access to MVPDs’ traditional linear distribution platforms, or to ameliorate independents’ preclusion from such access by conglomerate programmers’ oligopolistic control. As the Commission has recognized, Congress has imposed on the Commission a statutory “obligation to promote competition, programming diversity, and innovation in the public interest.” It is imperative that the Commission not shirk from that duty.

Respectfully submitted,

INSP, LLC

January 26, 2017